

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Issue date: 20Jun2002

CASE NO. 2002-STA-5

IN THE MATTER OF

MICHAEL LEACH,
Complainant

v.

BASIN WESTERN, INC.,
AND PACIFIC INTERMOUNTAIN EXPRESS
Employer/Respondent

APPEARANCES:

MICHAEL LEACH,
Pro Se

David A. Anderson, Esq.
On behalf of Basin Western, Inc.

Kent Mitchell, Esq.
On behalf of Pacific Mountain Express

BEFORE:

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (Act) of 1982, as amended and re-codified, 49 U.S.C.A § 31105 and the corresponding regulations at 29 C.F.R. § 18.1 *et. seq.* and 29 C.F.R. § 1978.100 *et. seq.* (2001). Under the Act, a “person” is prohibited from discharging, disciplining or discriminating against an employee regarding pay, terms or privileges of employment because the employee refused to operate a vehicle in violation of a regulation, standard or order of the United States related to commercial

motor vehicle safety or health. 49 U.S.C. § 31105(a)(1)(B)(i) (2001). The Act defines an “employee” to include a driver of a commercial motor vehicle. 49 U.S.C. § 31101(2) (2001). An “employer” is defined as a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with business. 49 U.S.C. § 31101(3) (2001).

I. STATEMENT OF THE CASE

On June 13, 2001, Complainant, Michael Leach (Leach) filed a complaint with OSHA against Basin Western, Inc. (Basin) and Pacific Intermountain Express (PIE) (collectively the “Respondent”), alleging that Respondent discharged him on May 21, 2001 because of his refusal to drive a load of fuel to Pocatello, Idaho on May 15, 2001 in violation of the Federal Motor Carrier Safety Regulations prescriptions on “Ill or fatigued operators” and “Maximum driving time.” 49 C.F.R. § 392.3 (2001) (Ill or fatigued operator); 49 C.F.R. § 395.3 (2001) (Maximum driving time). (RX-1).

On September 13, 2001, OSHA Regional Administration, Adam M. Finkel dismissed the complaint as lacking in merit. On October 9, 2001, Leach appealed the dismissal and requested a hearing. Pursuant to that request, a hearing was set and held in Salt Lake City, Utah on April 9, 2002, at which Claimant represented himself. Attorney David A Anderson represented Basin. Kent Mitchel as owner and president represented PIE.¹

At the hearing all parties were afforded the opportunity to adduce testimony, offer evidence and submit post hearing briefs. Leach testified and introduced thirteen exhibits (PX-1 through 11, PX-13 and 14) which included a May 21, 2001 e-mail and letter of suspension addressed to Leach from Basin Vice President of Operation, Lloyd Dean (PX-1 and 2); a May 15, 2001 e-mail to PIE from Leach (PX-3); May 26 and June 6, 2001 e-mails from Mr. Leach to PIE; (PX-4 and 5); Leach’s driving logs for May 13 and 14, 2001, as submitted to Basin on those days (PX-6); a revised or dual log for May 14, and May 15, 2001, showing the actual time Leach was in duty and off duty status (PX-6a, 6b); the bill of lading and freight bill for the load Leach picked up at the Amoco Refinery in Salt Lake City and delivered to Moab, Utah on May 14, 2001 (PX-6c,d,e,); Leach’s driving logs for May 16 and 17, 2001, showing a trip to and from Albuquerque, New Mexico; a dispatch request and freight bill for the delivery of Jet A fuel from the Amoco Refinery in North Salt Lake City to Pocatello, Idaho for May 15, 2001 (PX-8); a freight bill with Leach’s driving log for March 26, 2001 with discrepancies highlighted on duplicate copies of freight bill and log (PX-9,9a); a freight bill for March 17, 2001 with discrepancies highlighted on a duplicate copy of such (PX-9b); cell-phone records of Leach from May 7 to May 20, 2001 (PX-10); a compliance review audit of Basin’s operations by the State of Utah Department of Transportation (RX-11); National Transportation Safety Board study on driver fatigue and truck accidents (PX-13); federal motor carrier safety regulation established by the U.S. Department of Transportation, Federal Highway Administration (PX-14).

¹References to the transcript and exhibits are as follows: hearing transcript-Tr. ____; Complainant’s exhibits- PX-____; Respondent Basin exhibits-RX-____.

Basin called three witnesses: Steven Kehl, Blair Workman and Jimmy Lloyd Dean (Kehl, Workman and Dean respectively) and introduced twenty-three exhibits which included a copy OSHA investigation showing no merit to Leach's complaint (RX-1); a May 14, 2001 freight bill and bill of lading showing the load Leach picked up at the Amoco Refinery and delivered to Moab, Utah (RX-2); a freight bill and dispatch request for the May 15, 2001 delivery of fuel to Pocatello, Idaho (RX-3); a May 16, 2001 letter from Leach to Kehl and Workman threatening to sue concerning low paying loads (PX-4); Leach's May 13, 14, 16 and 17, 2001 driver logs (RX-5); March 8 and 13 e-mails from and to Leach concerning his resignation from PIE (RX-6); March 13 and 14, 2001 e-mails to and from Dean (RX-7); equipment lease agreement between Basin and PIE (RX-8); compliance review by Department of Transportation, State of Utah dated October 8, 2001 (RX-9 and 23); May 21, 2001 e-mail from Leach to Dean (RX-10); May 21, 2001 letter of suspension to Leach from Lloyd Dean (RX-11); May 25, 2001 e-mail from Dean to Leach (RX-12); May 2, 2001 e-mail from Leach to Dean (RX-13); e-mail from Dean to Leach (RX-14); e-mails from and to Leach dated May 26, 29, June 21, 2001 (RX-15, 16, 17); e-mails from Kent Mitchell (Mitchell) to Dean forwarding Leach's e-mails (RX-18); Basin Driver Manual (RX-19); United States Department of Transportation federal motor carrier safety regulations (RX-20); Leach's receipt of safety regulations (RX-21); list of employees who left Basin from January 2001 to June 26, 2001. (RX-22). Mitchell testified on behalf of PIE but introduced no documents.

II. ISSUES

1. Whether Basin terminated or suspended Leach in violation of 49 U.S.C. § 31105(a)(1)(B)(i) of the Act because of his refusal on May 15, 2001, to drive a load of fuel from the Amoco Refinery in North Salt Lake City, Utah to Pocatello, Idaho.
2. Whether PIE was responsible for Leach's suspension or termination from Basin because of Leach's action in refusing to drive a load of fuel from the Amoco Refinery in North Salt Lake City, Utah to Pocatello, Idaho.
3. Whether Basin knowingly permitted drivers including Leach to drive excessive hours in violation of Federal Motor Carrier Safety Regulations.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

Basin is engaged in the interstate transportation of petroleum products by truck to various locations in the Western United States. Basin owns and operates a fleet of trucks and trailers from a facility located in North Salt Lake City, Utah. In 2001 Basin employed 113 drivers and operated one-hundred trucks, twenty-three of which were company owned with the remainder under lease from various independent contractors such as PIE, which leased two trucks to Basin. (Tr. 185,186).

Basin's management staff consisted of a chief operations officer and a vice-president of operations, Lloyd Dean, who was responsible for overall terminal functions. Reporting to Dean was terminal manager, Blair Workman, and dispatcher, Steven Kehl. Workman's duties included compliance with safety regulations, scheduling repairs, and "trouble shooting" loading and unloading operations. (Tr. 12,159-160). Kehl's job consisted of lining up or scheduling drivers with loads to meet customer demand. (Tr. 143). Leach received his driving assignments or dispatches directly from Kehl. (Tr. 70, 71, 143).

Kent Mitchell owned, was the president, and managed PIE. In 1999 and 2000 Mitchell leased two trucks to Basin. In January, 2001, Mitchell entered into another lease agreement with Basin providing for the lease of truck No. 240 with PIE receiving ninety percent of the gross revenue generated by the truck with the stipulation that PIE provide routine maintenance. According to the lease agreement, Basin, as the carrier, was responsible for driver compensation, payment of FICA, taxes, workers compensation, public liability, property damage, and cargo insurance. Further, PIE was considered to be an independent contractor having no agency, partner, or joint venture relationship with Basin. (RX-8).

Mitchell had no ownership interest in Basin and exercised no supervisory control over Basin employees. Regarding Leach, Mitchell placed an ad in the local newspaper (Tribune) seeking drivers for his trucks. Mitchell road tested and approved Leach to drive his trucks but did not hire, discipline or supervised his driving activities. Rather that responsibility was left to Dean who hired Leach as a Basin employee on September 8, 2000. (Tr.15, 170, 171). Leach drove tank trucks for Basin hauling petroleum products from September 8, 2000, through May 17, 2001. (Tr.11,12). Dean suspended Leach on May 21, 2001. (RX-11, CX-2). Following the suspension Leach never returned to work for Basin.

On September 18, 2000, Basin provided Leach with its Driver Manual. At page twenty-three under a section entitled "The Log Book & Hours of Service Regulations:" the manual states:

Basin Western appreciates the willingness of drivers to move freight and complete schedules, but **cannot and will not permit hours of service violations**. The company operates seven days per week, therefore no driver may remain on duty more than 70 hours in any eight day period.

The DOT log book must be accurately and neatly prepared. All changes of duty times must coincide with the freight bill, pay log, and automatic recording devices where applicable. . . .

The DOT requires that the record of duty status be kept current up to the last change of duty status. DOT logs must be turned in to your home terminal along with the freight bills. Freight bills, including driver's pay logs, will not be processed until accompanied by the appropriate duty status logs.

Log books, with the drivers copy intact must be kept in the drivers possession at all times while on duty. This must include completed log sheets for at least the previous eight days.

It is the drivers responsibility to keep the hours of service records including an accurate recap. If at any time a driver is called for work and does not have the hours necessary to complete the trip or after starting, runs out of hours, He must inform the dispatcher.

Falsification of the record of duty log will not be tolerated by Basin Western. If for some reason, a violation occurs record it on the log, explaining why the violation occurred.

The safety department will audit logs as they come in. If violations are found, a letter will be sent to the driver with a copy of his log in order to show why he is in violation. If in any six month period of time a driver receives three or more letters concerning log violations, a conference will be set up between that driver, his dispatcher, and the safety department in order to find out why the violations are occurring and what must be done to avoid them. If the violations continue, there will be further action taken including suspension and possible dismissal from the employ of the company. Missing logs will be treated as violations for the purposes of this policy. THE HOURS OF SERVICE REGULATIONS ARE TAKEN VERY SERIOUSLY BY BOTH THE COMPANY AND THE DOT. BASIN WESTERN WILL NOT TOLERATE VIOLATIONS OF THEM.

On that same day, September 9,2000, Basin also provided Leach with a copy of the Federal Motor Carrier Safety Regulations Pocketbook (Safety Regs). Section 395.3 of the Safety Regs provides:

(a) Except as provided in §§ 395.1 (b)(1), 395.1 (f) and 395.1(i) no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:

- (1) More than 10 hours following 8 consecutive hours off duty or
- (2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(B) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services, for any period after-

- (1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week or
- (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3 (2001).

Part 392.3 of the Safety Regs provides in relevant part:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle....

49 C.F.R. § 392.3 (2001); (RX-20; PX-14)

B. Chronology of Events Leading to Leach's Suspension Letter

While the parties disagree over certain factual conclusions such as whether Leach was suspended or terminated, and the reason prompting such action, they agree on many of the underlying facts. The undisputed evidence shows that prior to his receipt on May 21, 2001, of a letter from Dean suspending him for one week, Leach, on March 8, 2001, notified Mitchell by e-mail that he was resigning because of a failure by Basin to timely remit child support payments, combined with an inability to make sufficient income (\$42,000.00 per year) due to poor paying dispatches (loads), and because Basin provided him with mechanically defective trailers. (RX-6). Mitchell replied by e-mail on March 13, 2001, saying that he (Leach) had worked through the slowest season of the year and that he (Mitchell) would be glad to discuss the issues Leach raised.

On the same date, March 13, 2001, Leach e-mailed Dean setting forth additional reasons for his resignations including an unidentified persons search, removing his personal belongings from the truck, and Basin's failure to reimburse him for road expenses. The following day Dean e-mailed Leach responding to his concerns, but stating that Basin could not guarantee any minimum salary and asking Leach to resolve his difficulties with Mitchell because Dean did not want to lose him as a driver. (RX-7, Tr. 190).

Leach changed his mind about resigning and on March 26, 2001, took a load of petroleum gas from Duke Energy's Patrick Draw, Wyoming to Barrick Gold Strike Mine in Carlin, Nevada with a return to Basin's terminal the following day. Upon his return Leach submitted a freight bill with times of arrival, loading and unloading, and a copy of his logs. Basin noticed discrepancies between the times listed on the freight bill and logs, and informed Leach the times on both documents should be the same. (Tr. 116-118; PX-9, 9a). Basin had also noticed and advised Leach of similar discrepancies on other runs in February, 2001. (PX-9b).

Leach worked without incident until May 14, 2001. At 6:30 a.m., Leach reported to the Basin terminal and picked up a freight bill showing a dispatch to Moab, Utah. He then picked up two trailers (Rocky Mountain doubles), did a pre-trip inspection of his equipment, drove to the Amoco Refinery located about 5 miles from the Basin terminal, and waited until 9 a.m. to be loaded only to have Amoco reject his trailers because of expired inspection documents.² Leach returned to the terminal, picked up two other trailers, and drove back to Amoco where he completed loading and departed for Moab at 2 p.m. Leach arrived in Moab sometime after 6:54 p.m., and finished unloading at 11:30 p.m., whereupon he drove to Crescent Junction, Utah, prepared his logs, and then drove to Wellington, Utah arriving there at 2 a.m. Leach parked his truck and slept from 2 a.m. to 4 a.m. After drinking coffee for forty-five minutes Leach resumed driving and arrived at the Basin terminal at 7:45 a.m. on May 15, 2001. (Tr. 72-82, PX-6a, 6b).

On May 14, 2001, Kehl telephoned Leach on two occasions while en route to Moab. The first call was placed at 3:12 p.m. during which Kehl asked Leach how he was doing. Kehl made the second call at 6:54 p.m. telling Leach he needed to get to the station in Moab promptly since the station was out of fuel and upon his return to the Basin terminal he had another load. (Tr. 83-87).

Upon arriving back at the Basin terminal on the morning of May 15, 2001, Leach turned in his paper-work (freight bills and logs), and found another dispatch from the Amoco Refinery to Pocatello, Idaho. Leach approached Kehl and told him that he was not going to take the load and that he, Kehl, could take the freight bill and "shove it up his ass."

At no time did Leach advise Kehl he was out of hours because of the Moab run. Rather Leach assumed Kehl knew because of their conversation on May 14, 2001, as previously noted (PX-8, Tr. 88,89, 147-149). However the logs which Leach turned in (PX-6) failed to show any work on May 15, 2001, and only 6.75 hours of driving and on duty time on May 14, 2001. (PX-6).

Leach then went home and later that morning at 9:46 a.m. he e-mailed Mitchell telling him he had refused the Pocatello run having just spent 17.5 hours on the Moab load and was upset with Basin not giving him his pay check on time. (PX-3). Later that day, Leach called Kehl, apologized for his conduct and received another load for May 16, 2001, to Albuquerque, New Mexico which he completed on May 17, 2001. (PX-7, RX-5, Tr. 91, 92). However, before going on that trip, Leach wrote a letter to Kehl and Workman entitled "Notice of Intent to Sue." Kehl and Workman apparently did not read the letter until after Leach left for Albuquerque. In the letter Leach complained about receiving low paying loads and stated he was going to sue them individually along with Basin and PIE for discrimination and breach of contract, and was seeking punitive damages. (RX-4, Tr. 161).

Workman called Dean upon reading the letter and faxed him a copy of it. Workman told

² Dean admitted that the loading delays were Basin's fault in not submitting the proper paper work on the trailer inspection. (Tr. 188, 189).

Dean that he was concerned about Leach's apparent anger which had continued from the previous day. (Tr. 161,162). Dean also expressed concern about Leach's anger and decided to suspend him for a week to let Leach have time to cool down. Due to a family crisis (death of Leach's father in law), Dean decided to wait to May 21, 2001, before sending Leach a letter of suspension. (Tr. 190-193). The suspension letter read as follows:

Mr. Leach,

Your behavior the afternoon of 05/15/01 in regard to the load dispatched out of Amoco Refinery is unacceptable. Amoco is and has been in the midst of system upgrades and EPA audits and so is requiring certain tests and inspections that have not been necessary in the past. I am sorry that this has inconvenienced you; however to throw a freight bill on the floor and state to the office personnel that they can take the load and "shove it up their a**" will not be tolerated by Basin Western.

As a result of those actions, I am placing you on suspension from active dispatch for a period of one week. Your continued employment with Basin Western, Inc. will be contingent on completion of a 90 probationary period following the suspension. Any further outbursts of this nature will result in the termination of your employment with Basin Western, Inc.

(RX-11, PX-1,2)

On the same says as the letter of suspension, Leach e-mailed Dean telling him, contrary to the suspension letter, that he considered himself terminated and wanted his final paycheck and reasons for his termination. (RX-10). On May 23, 2001, Leach e-mailed Dean again contending he had been hired by Mitchell at a yearly salary of \$42,000, recounting the details of the dispatch to Moab with delays and time spent in the delivery requiring him to be on duty 21.5 consecutive hours only to have Kehl give him a dispatch to Pocatello upon his return. Leach further advised that he would return to work if given a dedicated run to Barrick Gold Strike mine which would allow him to make more than \$42,000.00 per year and up to six loads per week.³ (RX-12).

On May 25, 2001, Leach e-mailed Dean telling him that he was willing to accept a position as terminal manager at the Basin facility. (RX-13). Later that day, Leach e-mailed Dean again advising of his lack of driving time upon arriving back from Moab but claiming (incorrectly) that Kehl had demanded he leave immediately for Pocatello upon his arrival at the Basin terminal on the morning of May 15, 2001. Leach also mentioned for the first time that his suspension was unlawful because it involved falsifications of logs and having him drive under unsafe conditions. (RX-14). On May 29, 2001, Dean e-mailed Leach asking why Leach had not explained the problem initially to Kehl

³ In a May 25, 2001, e-mail to Dean, Leach offered to return to work if appointed terminal manager. In such a position Leach contended he could fix all problems and do it quickly and efficiently but that his services did not come "cheap". (RX-13)

and why he (Leach) had not taken a mandatory layover between Moab and Basin.

On May 26, 2001, Leach e-mailed Mitchell on two occasions contending he had been terminated and asking for an explanation of his status. (PX-5, RX-15). On May 29, 2001, Leach e-mailed Dean again contending he had been terminated with the entire problem centered on his inability to earn \$42,000.00 per year. On June 6 and 21, 2001, Leach e-mailed Mitchell asking for an explanation of his termination and threatening to bring both Basin and PIE into compliance with state and federal regulations and if necessary to force an explanation for his termination. (PX-4, RX-17).

C. Witness Testimony

(1) Michael Leach

Leach is a forty-seven year old male with three years of college and four years in the U.S. Navy, of which one year was spent in the JAG Corps. Prior to his employment with Basin, Leach worked as a truck driver and spent ten years with the Utah State Department of Transportation as a surveyor, office technician, and highway operations specialist in the maintenance division responsible for helping to clean up and investigate highway accidents. (Tr. 69, 112-114).

Leach testified at length about his driving for Basin and in particular the events of May 14 and 15, 2001, as previously described. (Tr. 72-92). Leach testified that he refused the Pocatello dispatch because he was exhausted and needed the rest considering the fact that he had been awake for over a day. (Tr. 90-92). Leach allegedly called Mitchell after returning home on the morning of May 15 and explained the reason for his refusal, but he never provided any explanation to Kehl or Workman. (Tr. 88-90, 118).

Leach admitted that he routinely kept two sets of logs and drove excessive hours in order to meet company demands, but he stated that such a practice was common in the industry and Basin supervisors were well aware of the practice. (Tr. 95, 96, 109, 110). In fact PX-6 and PX-6a were examples of dual logs with PX-6 being the log he turned in on May 15, 2001, showing inaccurate times of 6.75 hours on May 14, 2001, (5.75 hour driving and one hour on duty not driving), as opposed to PX-6a, the true log of May 14, 2001, showing 17.5 hours on May 14, 2001, (six hours driving and 11.5 hours on duty not driving).

Indeed as evidence of company directives to falsify logs, Leach testified that on occasion he was instructed by Basin to make sure that the time listed on the freight bill for loading and unloading matched with the logs submitted. For example Leach cited his run to the Barrick Gold Strike Mine on March 26, 2001. When he returned on March 27, 2001, and submitted his logs and freight bill the loading and unloading times did not match. In turn he was advised that the times on the freight bills and logs should reflect the same time. (Tr. 97-109). According to Leach, Basin frequently reminded him of log and freight bill discrepancies but took no disciplinary action against him. In fact Leach admitted keeping dual logs since his third day of employment because such was expected of him to

meet the work load. (Tr. 230-241).

When I questioned Leach further about the Barrick run, Leach admitted that he had an obligation to make sure that the times reported on the bill of lading and logs sheets were the same and were accurate, but that the hours he showed on March 26, 2001, reflecting time in the sleeper berth were inaccurate. Leach presented no evidence, however, to show that Basin was aware of the inaccuracy of the time he reported being in the sleeper berth.

On cross-examination Leach admitted a long running dispute with Basin and PIE causing him to resign in March 2001, and then come back to work but continuing to fault both Basin and PIE for failing to provide him with sufficient loads to make an annual salary of \$42,000.00 while offering to return after his suspension if guaranteed enough Barrick Gold Mine runs to make \$42,000.00, or in the alternative hired as terminal manager. (Tr. 116-139).

(2) Steven Kehl

Kehl, who has been employed by Basin for the past four years as a dispatcher, testified that he sent Leach to Moab on May 14, 2001, with an understanding that he would be there by noon. (Tr. 143, 144). Later that afternoon Kehl assigned Leach to make a load the following day to Pocatello, aware that he had problems earlier that day while loading at Amoco which caused him to arrive in Moab on May 14 sometime after 6:45 p.m. (Tr. 145, 146).

On the morning of May 15, 2001, at 8 a.m., Leach approached Kehl as he was coming through the front door of the terminal, threw the Pocatello freight bill down and told him to stick it up his ass. Kehl made no demand that Leach accept the dispatch and was unaware of the driving hours available to Leach. (Tr. 151). Kehl reported the incident to Workman. Later that day after Leach called and apologized. Kehl gave Leach another assignment for the following day to Albuquerque. (Tr. 147-150).

Kehl testified that he has reassigned loads from drivers when they are out of hours. (Tr. 152). Kehl denied telling Leach not to keep accurate driving records. (Tr. 153). However, Kehl admitted turning his back or ignoring instances when drivers submitted false logs. (Tr. 156, 157). According to Kehl the Pocatello dispatch had a flexible delivery time - taking only three hours to drive with one hour to unload - with an expected arrival time no later than 4 p.m. (RX-3-2, Tr. 153).

(3) Blair Workman

Workman, the terminal manager, testified that upon learning of Leach's refusal to make the Pocatello run he became concerned because of Leach's apparent anger and advised Dean of the incident. When Leach apologized, Workman agreed to send him on another run to Albuquerque on May 16, 2001. After Leach's dispatch, Workman read Leach's letter indicating an intent to sue him and other management personnel and so informed Dean..

Workman testified that other drivers have turned down loads because of a lack of hours whereupon Basin reassigned the load to another driver. He has never tolerated driver log falsification and has terminated drivers in the past who did such but could not remember the name of these drivers. Further, he never told Leach to inaccurately report his time and routinely questioned drivers when discrepancies occur in freight bills and logs and that PX-9 was merely an example of making sure that logs and freight bill reflected the same time as required by the DOT. (Tr.163-165).

(4) Kent Mitchell

Mitchell has been president of PIE for the past five years. Mitchell described his relationship with Basin as an independent contractor and owner of two trucks who leased the vehicles to Basin as set forth in RX-8. (Tr. 184). Mitchell admitted placing an ad in the local paper, whereby he became acquainted with Leach, and that he road tested Leach before allowing Leach to drive one of his trucks, but Mitchell denied any supervisory role over Leach or ownership interest in Basin. (Tr. 170, 171).

Mitchell testified that Dean called him on May 16, 2001, and told him he was going to suspend Leach for the incident which occurred several days earlier. Mitchell asked Dean for a replacement driver but was informed Basin had no replacements. (Tr. 172-173). A replacement driver was found on May 18, 2001. (Tr. 182). Mitchell denied any knowledge concerning the amount of hours Leach spent on the Moab run until after being notified of Leach's suspension. Mitchell decided not to answer Leach's e-mails but rather to let Basin deal with them. (Tr. 174-176).

(5) Jimmy Lloyd Dean

Dean has work for Basin for over nineteen years in various positions including: compliance officer, vice-president (eighteen years), and chief operations officer (one year). Dean described Basin's operations as previously noted including Leach's dispatch to Moab.

Dean testified that Workman called him on May 15, 2001, and told him about Leach's refusal to take the Pocatello run. Dean became concerned because of the anger Leach expressed and asked Workman to get Leach's version of events. On May 16, 2001, Workman reported that Leach had apologized whereupon he was given another run to Albuquerque. However after dispatching Leach, Workman told Dean he read Leach's letter threatening to sue. At that point Dean was convinced that Leach was still very angry and posed a potential safety threat whereupon he decided to suspend him for one week in order to let him cool down. (Tr. 190, 191). Workman sent Dean a copy of Leach's letter of May 16, 2001, threatening to sue. Dean denied talking to Mitchell until after making the decision to suspend Leach.

Dean testified that: Leach could have legally made the Pocatello run had he rested the required hours after unloading in Moab, that it was common practice to give drivers a dispatch one day in advance, and that it was up to the driver to inform Kehl if they were out of hours. (Tr. 199,

200). Dean insisted that drivers were instructed to follow the DOT regulations and that a computer generated rapid compliance log helped to assure that logs and freight bill coincide. (Tr. 201-206, 226-229).

Dean denied log falsification to be a common industry practice and stated that it such falsification was against company policy. (Tr. 207-209). Further, Basin had suspended and terminated drivers for such conduct citing examples of driver Bill Essex (suspended for excessive anger and speeding), driver Sergio Mendagazzo (suspended for failure to properly unload propane tank), driver John Bell (terminated for threatening terminal manager) and driver John Mello (terminated for log falsification). (Tr. 213-215).

D. Basin's Dispatching System

Leach testified that it was a common practice for Basin drivers including himself to drive excessive hours in violation of Part 395.3 of the Safety Regs with Basin's approval. Part 395.3 Hours of Service of Drivers provides as follows:

- (a) Except as provided in § 395.5(b)(1), 3.95.1(f) and 395.1(i), no motor carrier shall permit or require any driver used by it to drive nor shall any such driver drive:
 - (1) More than 10 hours following 8 consecutive 8 hours off duty; or
 - (2) For any period after having duty 15 hours following 8 consecutive hours off duty.
- (b) No motor carrier shall permit or require a driver of a commercial motor vehicle to drive, nor shall any driver drive, regardless of the number of motor carriers using the driver's services for any period after—
 - (1) Having been on duty 60 hours in any 7 consecutive days if the employing motor carrier does not operated commercial motor vehicles every day of the week; or
 - (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

49 C.F.R. § 395.3 (2001).

In support of this position, Leach questioned and elicited the following response from Kehl:

Q. Over the course of your employment, have you ever known of any falsifications of driver logs to take place at Basin Western?

A. I turn my back on it, I frown on it.

(Tr. 156, ll 14-17).

Leach also introduced a Compliance Review by the State of Utah, Department of Transportation dated October 9, 2001 which showed, among other things, eleven drivers being checked and the following Hours of Service violations:

Section	# of drivers in violation	checked	% in violation
395.3a1 10 HR	3	11	27
395.3b 60/70 HR	3	11	27

(PX-11, RX 23).

The report also showed violations regarding 49 C.F.R. § 395.8(f) (2001) (failing to require driver to prepare record of duty status in form and manner prescribed (9%)); 49 C.F.R. § 395.8(e) (2001) (false reports of record of duty status (18%)); and 49 C.F.R. § 395.8 (a) (2001) (failing to require driver to make a record of duty status (9%)).

Leach also testified that Basin knew and accepted the practice of keeping dual log books to meet DOT regulations and asking drivers to submit new logs to reflect the same times as indicated on freight bills. (Tr 95-109). Dean denied any policy permitting or allowing hours of service violations, pointed to the overall satisfactory rating given Basin by the State of Utah, and further related that pointing out discrepancies between logs and freight bills was by Basin in an effort to encourage better and more accurate logs. (Tr. 223-234).

E. Causal Relationship Between Protected Activity and Adverse Employment Action

Prima Facie Case

To establish *prima facie* case of causation under Section 31105 of the Act, the discharged employee must show: 1) he engaged in a protected activity under Act, 2) he was subject to adverse employment action, and 3) that there was causal link between his protected activity and adverse action of his employer. *BSP Trans, Inc. v. U.S. Department of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 46 (2nd Cir. 1995); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226 (6th Cir. 1987)(adopting the framework for retaliatory discharge set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)); *Burrus v. United Telephone Co.*, 683 F.2d 339, 342 (10th Cir. 1982)(applying same elements in a Title VII case). Proximity in time between protected activity and adverse employment action may give rise to an inference of a causal connection. *Burrus* 683 F.2d at 343 (finding three years between complainant and termination insufficient to establish a *prima facie* case); *Goggin Truck Line Co., Inc. v. Administrative Review Board*, 172 F.3d 872 (6th Cir. 1999)(unpub)(finding that a firing a truck driver within three working days of protected activity raises an inference of causation sufficient to establish a *prima facie* case).

Rebuttal of the *Prima Facie* Case

Once a prima facie case is established, one which raises an inference that protected activity was the likely reason for the adverse action, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. *BSP Trans, Inc. v. U.S. Department of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). The defendant need not prove the “absence of retaliatory motive, but only produce evidence that would dispel the inference of retaliation by establishing the existence of a legitimate reason.” *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S. Ct. 1089, 1094, 67 L. Ed. 2d 207 (1980)(applying criteria in sex discrimination case). The evidence must be sufficient to raise a genuine issue of fact as to whether the respondent discriminated against the complainant. *Germann v. Calmat Co.*, 99-STA-15 (August 6, 1999) (ALJ) (citing *Texas Department of Community Affairs*, 450 U. S at 254).

Causation Based on Record as a Whole

If the respondent is successful in rebutting the inference of retaliation, the complainant bears the ultimate burden of demonstrating by a preponderance of the evidence that the legitimate reasons were a pretext for discrimination. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). A complainant may conclusively establish retaliation if the complainant can show that the respondent’s reasons for taking the adverse action are merely pre-textual. *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998). If the respondent asserts both legitimate and discriminatory reasons for an adverse action, the dual motive analysis applies. *Id.*; *Spearman v. Roadway Express, Inc.*, 92-STA-1 (Sec’y June 30, 1993). Under the dual motives analysis the respondent must show by a preponderance of the evidence that it would have taken the adverse action in the absence of any protected activity. *Herman*, 146 F.3d at 21. (Citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-53 109 S. Ct. 1775, 1792 104 L. Ed. 2d 268 (1989)(stating that while the lower court required the employer “to prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.”); *Cf. Remusat v. Barlett, Inc.*, 94-ERA-36 (Sec’y Feb. 26, 1996)(applying clear and convincing standard in dual motives analysis).

In the present case Leach clearly showed that he was subjected to adverse action, i.e, a one week suspension. Leach, however presented no evidence to show he was discharged. Rather the evidence showed he chose not to return to work unless guaranteed a \$42,000 annual salary or the position of terminal manager. Dean’s rejection of these terms can hardly be said to constitute a discharge.

Concerning the issue of protected activity, Leach testified that at about 8:30 a.m., on May 15, 2001, he telephoned Mitchell and said he had refused the Pocatello dispatch because he was too

tired having been up for over twenty-four hours and that after talking to Mitchell he sent him an e-mail. (Tr. 118). Mitchell had no recollection of the call. Leach's e-mail to Mitchell on May 15, 2001, made no reference to being too tired to drive. Rather the e-mail complains about poor dispatches to Amoco and failure to be paid on time. (RX-18, p. 3; PX-3).

Indeed the first reference to excess driving hours came in the May 25, 2001 e-mail from Leach to Dean on May 23, 2001, which was two days following his suspension. In this e-mail Leach detailed his work in connection with the Moab run requiring him to be on duty over twenty-one hours only to be greeted on the morning of May 15, 2001, with an alleged demand from Kehl to make an immediate trip to Pocatello. Kehl admittedly made no such demand.

Had Leach refused the Pocatello run either because of a lack of driving time or exhaustion due to excessive work on the Moab dispatch such conduct would have been protected activity. However, I am convinced that neither reason prompted his decision to refuse the Pocatello dispatch. Rather the refusal was based upon a dislike for dispatches from Amoco, which was where he would have had to drive in order to pick up the load for Pocatello, plus Basin's refusal to pay him on time. None of these reasons constitutes protected activity.

Even assuming, *arguendo*, that Leach was motivated by a desire not to violate Safety Regs, such motivation was not manifest to Kehl, Workman or Dean prior to Leach's suspension. Rather what concerned Workman and Dean, was Leach's angry attitude in not only refusing the Pocatello load but also in threatening to sue them on matters unrelated to the Pocatello dispatch. Thus, Dean had a legitimate, non-discriminatory reason for Leach's suspension thereby rebutting any alleged *prima facie* showing.

Based upon the entire record I find Leach failed to establish two essential elements of a *prima facie* case: protected activity, and a nexus between such activity and adverse action. Moreover, Dean articulated a non-discriminatory reason for Leach's suspension which Leach never showed to be pretextual. Accordingly, I find no merit to Leach's claim of having been either suspended or discharged for protected activity and recommend dismissal of his complaint regarding such allegations.

Regarding Leach's allegations that Basin approved of drivers driving excessive hours in violation of the Safety Regs, I noted that 49 C.F.R. § 395.1 (2001), specifically requires observance of the "Hours of Service of Drivers" by both carrier and driver alike, and that Leach presented credible testimony that (1) he routinely kept two sets of logs and drove in violation of the Safety Regs; (2) Basin was aware of the dual log practice - even noting repeated discrepancies between times listed on freight bills, bills of lading, and logs - but took no action against Leach because of such conduct; (3) dispatcher Kehl turned his back on, and thus tolerated, driver submission of false logs; (4) an audit of Basin's operations by the Utah Department of Transportation on October 9, 2001 showed twenty-seven percent of the drivers checked were in violation of the ten hour rule (49 C.F.R.

§ 395.3(a)(1)) and 60/70 hour rule (49 C.F.R. § 395.3(a)(2)) as well as other violations dealing with recording of duty status.

Because of the potential for significant harm to occur if said conduct continues, especially considering the hazardous cargo transported by Basin, I am referring this matter to Federal Motor Carrier Safety Administration for further investigation and appropriate disposition pursuant to the Motor Carrier Safety Improvement Act of 1999, Pub. L. 1060159, 113 Stat. 1748 (December 9, 1999).

IV. RECOMMENDED ORDER

The complaint of Michael Leach pursuant to Section 31105 (a)(1) of the Surface Transportation Assistance Act is **DISMISSED**.

A handwritten signature in black ink that reads "Clement J. Kennington" with a small trademark symbol (TM) at the end.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE: This Recommended Decision and/or Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. See 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).